Supreme Court, U. S.
FILED
APR 15 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 76-1433

WILLIAM BUTLER Petitioner

VS.

UNITED STATES OF AMERICA Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For the Fifth Circuit

W. E. GORE, JR.
P. O. Box 186
Jackson, Ms. 39205

WILLIAM O. MARBLE
P. O. Box 1526
Jackson, Ms. 39205

ATTORNEYS FOR
PETITIONER

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The United States Court of Appeals for
The Fifth Circuit

INTRODUCTORY STATEMENT

The petitioner, William Butler, respectfully prays that a Writ of Certiorari issue to review the order and opinion entered November 18, 1976, by the United States Court of Appeals for the Fifth Circuit denying his petition for rehearing on his appeal from a conviction in the United States District Court for the Southern District of Mississippi.

OPINIONS BELOW

The order sought to be reviewed is the order denying the petition for rehearing,

United States of America vs. William Butler, November 18, 1976 (No. 76-1757).

The first opinion of the District Court of the Southern District of Mississippi, dated December 17, 1975, is wherein the defendant was found guilty of the violations charged.

The opinion of the United States Court of Appeals next followed, and was dated August 30, 1976. Said opinion appears in Appendix "A" to this Petition.

A petition for rehearing before the United States Court of Appeals for the Fifth Circuit was filed with an order denying the rehearing entered and dated November 18, 1976. Said petition and order appear in Appendix "A" to this Petition.

JURISDICTION

On December 15-17, 1975, Petitioner was tried and convicted in the District Court on indictments charging him with violation of Sections 2312 and 2,Title 18, U.S.C., Transportation of Stolen Vehicles and violation of Section 2314 and 2,Title 18, U.S.C., Transportation of Stolen Goods. Said conviction was appealed to the Court of Appeals for the Fifth Circuit. The jurisdiction of the Supreme Court of the United States is invoked by and under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Was the action of the United States Court of Appeals for the Fifth Circuit in affirming the conviction of Petitioner on

a charge of transportation of stolen vehicles totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment?

2. Did the action of the Court of Appeals for the Fifth Circuit in denying a rehearing to Petitioner on the grounds as set out in paragraph four of his petition for rehearing, where references to other crimes was not the subject of trial, but the Trial Judge's failure to give cautionary instruction to the jury concerning the remarks, violate the constitutional rights of Petitioner which are guaranteed to him under the Fourth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOKED

Amendments Four and Fourteen of the Constitution of the United States of America, which are printed in Appendix "B" hereto.

STATEMENT OF THE CASE

Petitioner was tried and convicted in the District Court of the Southern District of Mississippi for transportation of stolen vehicles and transportation of stolen property.

At the conclusion of the testimony offered by the government, the Petitioner made a motion for a directed verdict of not guilty as the evidence was insufficient to sustain a conviction. This motion was overruled. Petitioner rested his case

without offering testimony and the case was submitted to the jury without further evidence.

The record reveals that the only evidence adduced by the government to substantiate the charges against the Petitioner of transportation of stolen vehicles and transportation of stolen goods was that testimony of one Dennis Ray Phillips, who was also claimed to be involved in the act of commission as a principal participant.

The record reflects further that other witnesses, alleged by the government to have been at a meeting between Petitioner and another, could not identify the Petitioner at the trial.

The government completely failed to produce substantial evidence, other than the testimony of Phillips, who admitted under oath that he had already lied under oath three times, indicating Petitioner was guilty.

In the argument to the jury, the presenting attorney made certain references to other crimes that were not the subject of trial and of which no evidence or testimony had been introduced into the record. Defense counsel's objection to the remark was overruled and the Trial Judge failed to give any cautionary instruction to the jury concerning the remarks.

Trial counsel perfected an appeal to the Fifth Circuit Court of Appeals, but was discharged by Petitioner, who then obtained the services of other counsel, Hon. Edward Dixon, of New Orleans,

Louisiana. Mr. Dixon filed a brief on behalf of Petitioner contending, inter alia, that the government failed to present substantial evidence to prove the guilt of Petitioner. Petitioner's conviction was affirmed in a per curiam opinion, on August 30, 1976, and Petitioner discharged that counsel.

Finally, Petitioner, in late September, 1976, contacted W. E. Gore, Jr., and William O. Marble, who, after researching the record of the case, filed a petition for rehearing, said petition appended hereto. An order denying the rehearing was entered and Petitioner now seeks review on Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

In the opinion of present counsel, prejudicial error was committed in the trial, an error that was not brought out in the original appeal. Petitioner contends that the remarks made by counsel for the government during the closing arguments concerning other crimes that were not the issue of trial served no purpose but to prejudice the jury against the Petitioner and that constitutes reversible error. Through no fault of his own, Petitioner was denied a hearing on this issue before the Court, or any Court and that the ends of justice would best be served by granting the Petitioner this Writ.

It is settled law that where the charge against the defendant is totally devoid of evidentiary support, his conviction is unconstitutional under the due process clause of the Fourteenth Amendment.

Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960); Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed 2nd 207 (1961). A conviction denies due process on ground of insufficient evidence only where a charge is totally devoid of evidentiary support.

In reviewing the sufficiency of the evidence a guilty verdict will be sustained if there is substantial evidence taking the view most favorable to the government to support it.

"Substantial evidence" in this context means that a reasonable minded juror could accept as adequate and sufficent to support a conclusion of defendant's guilt beyond a reasonable doubt.

The charges against this Petitioner for transportation of stolen vehicles and transportation of stolen goods were so totally devoid of evidentiary support as to render the conviction unconstitutional under the due process clause of the Fourteenth Amendment. If the evidence fails to prove the essential elements, the conviction is not supported by the evidence in which event it does not comport with due process of law.

For the Supreme Court of the United States to take jurisdiction and review this case by certiorari, it seems that it is enough that the right, privilege or immunity under Federal law be asserted defensively.

All persons accused of crimes are guaranteed a right to trial by a fair and impartial jury. This is a basic guarantee under our Constitution. Certainly no jury can be fair and impartial when told in the final argument summation of other crimes committed or supposedly committed by the defendant which are not the subject of the trial.

The general rule long followed by Mississippi is to exclude evidence tending to show that a criminal defendant is guilty of another disconnected crime.

Such evidence tends to divert the minds of the jury from the true issue and to prejudice and mislead them. Whitlock v. State, 6 So. 237 (Ms. 1889); May v. State, 199 So. 2d 635, appeal after remand, 211 So. 2d 845 (Ms. 1967).

There are exceptions to the rule of exclusion. Unless an exception is applicable, the general rule is that it should be excluded, even if the other crimes are of the same nature. Lehoe v. State, 194 Ms. 339, 12 So. 2d 149 (1943). When it is doubtful whether it falls under the exception of the rule, it should be excluded. Hawkins v. State, 224 Ms. 309, 80 So. 2d 1 (1955).

The remarks of the presenting attorney, then, should have been excluded, and the jury given precautionary or cautionary instructions.

This Court has the authority and power to correct these wrongs under the provisions of 28 U.S.C. § 1254 (1).

CONCLUSION

For the reasons set forth, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM BUTLER,
Petitioner

By: W. E. Gore, Jr.
Of Counsel

W. E. GORE, JR.
P. O. Box 186
Jackson, Ms. 39205
(601) 354-4057

WILLIAM O. MARBLE
P. O. Box 1526
Jackson, Ms. 39205
(601) 354-4057

ATTORNEYS FOR PETITIONER

APPENDIX

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1757
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

versus

WILLIAM BUTLER,
Defendant/Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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(August 30, 1976)

Before AINSWORTH, CLARK and RONEY,
Circuit Judges.

PER CURIAM:

Defendant, William Butler, appeals his conviction for interstate transportation of three truck tractors in violation of 18 U.S.C.A. §§ 2312, 2314 and 2 on the ground that the Government failed to present substantial evidence to prove defendant's guilt beyond a reasonable doubt.

The thrust of defendant's claim is that (1) the Government's case relied on the testimony of an accomplice who had previously given three conflicting statements; (2) that the accomplice had pleaded guilty to charges of interstate transportation of stolen property, and could not be believed; and (3) that the Government knew of a witness who knew the facts, but its failure to call the witness created a presumption that his testimony would be unfavorable.

Concerning the testimony of an accomplice, this Circuit adheres to the following general rule

> . . .that in determining whether there is substantial evidence in cases where a conviction rests upon the uncorroborated testimony of an accomplice, the general rule is that the uncorroborated testimony of an accomplice may support a conviction if it is not incredible or otherwise unsubstantial on its face. United States v. Morales, 5th Cir. 1973, 477 F. 2d 1309; Tillery v. United States, 5th Cir. 1969, 411 F. 2d 644.

United States v. Sabin, 526 F. 2d 857, 859 (5th Cir. 1976). Rarely does an accomplice to criminal activity come before the Court with a pure record for credibility. In this case, however, the testimony was not totally uncorroborated. One witness testified that defendant and the accomplice wanted to sell him trucks in Arkansas. The Government's witness

also testified that they were forced to stop just short of the Louisiana-Arkansas state line because the truck would not "pull any more." An FBI agent testified that the missing truck tractors were found near the Louisiana-Arkansas line, and that there was trouble with the gears of the lead truck. The jury is the sole judge of a witness's credibility, and the record contains sufficient evidence from which the jury could find the appellant guilty. Glasser v. United States, 315 U.S. 60 (1942); United States v. Davis, 487 F. 2d 112 (5th Cir. 1973), cert. denied, 415 U.S. 981 (1974).

No merit lies in the contention that the Government witness's testimony must be presumed to be unfavorable because the Government failed to produce the witness. Appellant's reliance on Graves v. United States, 150 U.S. 118 (1893), is misplaced. In discussing the rule that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." Graves v. United States, supra, at 121, one must be aware that the rule only relates to a party against whom there has been proof of circumstances tending to support a fact, and the party against whom such evidence has been offered is so situated that he can offer evidence which would show that the circumstances can be accounted for consistent with his position in the case. The rule does not relate to the failure of the Government to produce

a witness whose favorable testimony would only tend to corroborate the evidence it has already produced in the prosecution.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1757

UNITED STATES OF AMERICA,
Plaintiff/Appellee

VS.

WILLIAM BUTLER,
Defendant/Appellant

PETITION FOR REHEARING

Comes now William Butler, the Defendant/Appellant herein, by and through counsel, and files this Petition for Rehearing in this cause and in support thereof would show unto the Court the following:

1.

That the Appellant was convicted in the United States District Court for the Southern District of Mississippi on a two-count indictment charging him with transportation of stolen vehicles in violation of Sections 2312 and 2, Title 18, U.S. Code and transportation of stolen goods in violation of Sections 2314 and 2, Title 18, U.S. Code. That the Appellant was represented at the trial of this

cause by Honorable James K. Dukes of Hattiesburg, Mississippi.

2.

That said trial counsel perfected an appeal to the Fifth Circuit Court of Appeals but was discharged by Appellant, who then obtained the services of Honorable Edward Dixon of New Orleans, Louisiana. Mr. Dixon filed a brief on behalf of Appellant, contending, inter alia, that the Government failed to present substantial evidence to prove Defendant's guilt beyond a reasonable doubt. This Court affirmed Appellant's conviction, in a per curiam opinion, on August 30, 1976.

3.

In late September, 1976, Appellant contacted W. E. Gore, Jr., and William O. Marble about the possibility of obtaining a writ of certiorari for appeal to the United States Supreme Court. The two attorneys researched the record in this cause and determined that, in their opinion, prejudicial error was committed in the trial, an error that was not brought out in the original appeal.

4.

Appellant would show that during his closing argument of the trial, the presenting attorney made certain references to other crimes that were not the subject of that trial and of which no testimony or other evidence had been introduced into the record. Defense counsel's objection to the prosecutor's remarks was overruled, but the trial judge failed to give any cautionary instructions to the jury concerning said remarks.

Appellant contends that these remarks served no purpose but to prejudice the jury against him and that such constitutes reversible error.

5.

That through no fault of his own, Appellant was denied a hearing on this issue before this Court and that the ends of justice would best be served by granting Appellant a rehearing before this Court.

Respectfully submitted,

WILLIAM BUTLER,
Appellant

By His Attorneys,
W. E. GORE, JR. and
WILLIAM O. MARBLE

/s/ William O. Marble
Of Counsel

W. E. GORE, JR.
P. O. Box 186
Jackson, Ms. 39205
(601) 354-4057

WILLIAM O. MARBLE
P. O. Box 1526
Jackson, Ms. 39205
(601) 354-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1757

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

versus

WILLIAM BUTLER,
Defendant/Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING
(November 18, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED and, upon consideration, the petition for rehearing is DENIED.

APPENDIX "B"

AMENDMENT IV TO THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.